

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**





76-6008

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

----- x

AMREP CORPORATION, : 76-6008

Appellant, :

-v- : 76-6013

FEDERAL TRADE COMMISSION, :

Appellee. :

----- x

UNITED STATES OF AMERICA :

-v- :

AMREP CORPORATION, RIO RANCHO : 76-1028

ESTATES, INC., ATC REALTY CORP., :

HOWARD W. FRIEDMAN, CHESTER CARITY, :

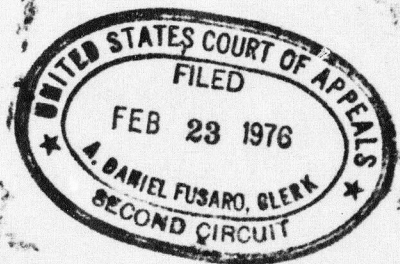
IRVING W. BLUM, HENRY L. HOFFMAN, :

HERMAN B. OBERMAN, SOLOMON H. FRIEND, :

and DANIEL FRIEDMAN, :

Defendants. :

----- x



APPEAL FROM ORDERS OF THE UNITED  
STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANT

PROSKAUER ROSE GOETZ & MENDELSON  
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### Introductory Statement

The Federal Trade Commission ("FTC" or "Commission") argues, in its brief ("FTC Brief"), that:

(a) despite the fact that the District Court is charged with the responsibility of assuring the fairness and integrity of criminal trials and administrative agency proceedings, it lacked jurisdiction to stay an FTC proceeding which threatens the validity of the criminal trial and which itself is being conducted in a manner which cannot result in a valid order;

(b) the prejudice to Amrep created by the conflicting pre-trial and trial schedules, the indictment of all of Amrep's principal officers (including general counsel who had been in charge of its defense before the FTC), and the requirement that Amrep present a "dress rehearsal" of its defense for the United States Attorney does not constitute a denial of Amrep's due process rights sufficient to threaten the validity of both proceedings; and

(c) despite the availability of injunctive relief against Amrep, and the opportunity to expedite the FTC proceeding through appropriate use of the transcript of the criminal trial, the public interest will somehow be injured unless the FTC is permitted to compel Amrep to comply with



a severely compressed FTC pre-trial and trial schedule while attempting to prepare for the criminal trial.

We shall demonstrate below that: (a) the District Court had the jurisdiction, indeed the responsibility, to review immediately the actions of the FTC in order to preserve the integrity of both proceedings; (b) forcing Amrep simultaneously to prepare and present defenses in two massive and complex proceedings presently before the FTC and the District Court will irreparably injure Amrep and can ~~only~~ result in the invalidity of one or both proceedings; and (c) a stay of the FTC proceeding until after the criminal trial, conditioned on the parties' agreement to permit appropriate use of the criminal trial transcript at the FTC hearing, will result in little or no delay of the FTC proceeding and, in the interim, there are ample means to protect the public interest.

FTC complaint counsels' resistance to expedition of the FTC proceeding through appropriate use of the criminal trial transcript and their decision to forego any preliminary injunctive remedy belie their professed concern for the public interest. Indeed, the Commission itself has apparently recognized that complaint counsels' refusal to consider the injunctive remedy is inconsistent with their demands to press forward on a tightly constricted time schedule for, as more



fully explained in Point III, infra, the Commission has felt compelled to direct complaint counsel to consider whether injunctive relief should be sought.

#### ARGUMENT

##### POINT I

#### THIS COURT HAS JURISDICTION TO REVIEW IMMEDIATELY THE VALIDITY OF THE FTC'S ORDERS

Despite the likelihood that both the FTC and criminal proceedings will be invalidated if allowed to continue simultaneously, the FTC claims that the District Court was without jurisdiction to take steps necessary to preserve the validity of these proceedings. Instead, the FTC asserts that Amrep will have "ample opportunity to challenge the alleged infirmities in a court of appeals" after the FTC hearing has been concluded (FTC Brief at 22).

However, this Court has recognized that the federal courts, in the exercise of their civil jurisdiction, should stay agency action which cannot result in a valid order. See Pepsico, Inc. v. Federal Trade Commission, 472 F.2d 179, 187 (2d Cir. 1972), cert. denied, 414 U.S. 876 (1973), and the additional cases cited at page 39 of our main brief. Since the discovery and hearing schedule sought to be imposed on Amrep by the FTC in its race with the criminal trial date



would deny Amrep sufficient time both to prepare the criminal case and comply with the FTC's demands, and has made it impossible for Amrep to retain counsel to represent it before the FTC and has rendered it extremely difficult to secure the assistance and testimony of its indicted officers necessary to defend against the FTC's charges, it is apparent that the FTC is proceeding in "a manner that cannot result in a valid order" and that a stay should issue under the rule in Pepsico

Similarly, this Court has recognized that the federal courts, in the exercise of their criminal jurisdiction,\* should stay parallel a civil proceeding which "threatens to

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\* Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45, cited by the FTC (FTC Brief at 21) for the proposition that a Court of Appeals should not exercise its civil jurisdiction to review FTC action until after the entry of a cease and desist order, is irrelevant to the Court's duty to exercise its criminal jurisdiction to stay agency action at any stage when it threatens to interfere with the integrity of a criminal trial.

Moreover, the cases cited by the FTC on this point (FTC Brief at 22-23) are all inapposite since they merely hold that a party is ordinarily required to seek review at the agency level before asking a court for relief. In all of those cases, a party sought judicial review of agency action before raising the issue before the agency. In the instant case, however, Amrep has sought relief from the Administrative Law Judge and from the Commission without success. (Amrep's appeal from the Administrative Law Judge's denial of Amrep's motion for a stay was submitted to the Commission on January 29, 1976, but no decision has been rendered as yet.) Thus, as Judge Metzner held below (484a-485a), Amrep has fully exhausted its administrative remedies (see discussion at pages 36-39 of our main brief).



interfere with the trial of the indictment or with such preparation of [the] defenses by the [defendants] as may be necessary." United States v. Simon, 373 F.2d 649, 654 (2d Cir. 1967). See also United States v. Birrell, 276 F. Supp. 798 (S.D.N.Y. 1967) (Herlands, J.).

As we have demonstrated in our main memorandum, the continuation of the FTC proceeding directly interferes with the preparation and presentation of Amrep's defense in the criminal case. Not only does the FTC schedule totally preempt the time available for preparation of Amrep's defense in the criminal case, but it also requires Amrep and its indicted officers to disclose their criminal defenses before trial if the FTC proceeding is to be adequately defended.

The likelihood that the information and admissions coerced from Amrep by the FTC will be used by the government in the criminal trial and thereby threaten the fundamental fairness of that trial is too great to allow the FTC to proceed at this time. See Silver v. McCamey, 221 F.2d 873 (D.C. Cir. 1955), and Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963) which are discussed at pages 61-62 of our main brief.



## POINT II

### AMREP WILL SUFFER IRREPARABLE HARM UNLESS THE FTC PROCEEDING IS STAYED

The FTC concedes that judicial intervention in the FTC proceeding would be appropriate if continuing the proceeding as scheduled would result in irreparable harm to Amrep (FTC Brief at 10). Yet, the FTC fails to recognize that ever since the grand jury returned its indictment naming Amrep and its top officers (including its general counsel) as defendants and conflicting pre-trial and trial schedules were set in the FTC and criminal proceedings, it has been clear that, if Amrep is forced to adhere to both schedules, then it will be deprived of its fundamental right to prepare and present adequate defenses in both proceedings.

This threat to Amrep's basic due process guarantees arises from the facts that: (a) the indictment of Amrep's general counsel, Solomon H. Friend, has left Amrep without representation before the FTC; (b) the compressed discovery and hearing schedule issued by the Administrative Law Judge renders it impossible to prepare and present an adequate defense in the time allowed and completely preempts the time required for preparation of the criminal case; (c) the indictment of Amrep's principal officers will render it virtually impossible for Amrep to secure assistance and testimony necessary to respond to the FTC's discovery demands or to



present an adequate defense at the FTC hearings until the criminal case has been tried; (d) trial of the FTC proceeding in advance of the criminal case would require Amrep to provide the United States Attorney with a full "dress rehearsal" of Amrep's defense to the criminal charge.

#### Amrep's Lack of Counsel Before the FTC

The FTC inaccurately characterizes Amrep's argument as a plea that its counsel has other commitments or as an insistence on particular lawyers to defend it (FTC Brief at 20). Amrep makes no such claims. In fact, the indictment of Solomon H. Friend has left Amrep without any counsel to defend itself before the FTC. Moreover, the impossible schedule imposed by the Administrative Law Judge, as well as the inaccessibility of Amrep's principal officers, who will be largely occupied with preparation of their criminal defenses and reluctant to provide information for use in defense of the FTC proceeding which can be used against them and will in any event disclose their defenses in the criminal case, has made it impossible for Amrep to retain new counsel to represent it before the FTC.\*

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\* Our firm recognized the impossibility of preparing for the FTC proceeding as soon as the Administrative Law Judge issued his December 2, 1975 scheduling order. Thus, by letter dated December 12, 1975, we advised him that we could not responsibly undertake Amrep's FTC defense. Since that time two other law firms have also declined to represent Amrep because of the problems created by the schedule being imposed (see our main brief at page 49). Thus, at the present time Amrep is without legal representation in the FTC proceeding.



The FTC's "solution" to Amrep's problem is to elevate to trial counsel status Mr. Friend's former assistants. However, this completely ignores the fact that Mr. Friend was an experienced litigator fully familiar with FTC proceedings who was chosen by Amrep to assume the responsibility of defending the FTC proceeding - which seeks to force Amrep out of business and threatens its very solvency. While it is true that other attorneys on the house counsel staff rendered assistance, it was never contemplated that they would be in charge of Amrep's defense in the FTC proceeding. Thus, for the FTC to denigrate Mr. Friend's status to that of a "fourth attorney" (FTC Brief at 19-20), is misleading and an attempt to dictate to Amrep whom it must employ as its trial counsel.

#### Amrep's Lack of Time to Prepare for Both Pending Proceedings

Even if Amrep had been able to retain counsel to defend it before the FTC, it is clear that (i) the severely compressed discovery and hearing schedule imposed by the Administrative Law Judge does not give Amrep sufficient time to prepare and present an adequate defense in the FTC case alone; and (ii) the FTC schedule completely preempts the time necessary to prepare for the criminal trial.

The FTC has not even attempted to explain how Amrep, with or without counsel, can answer or object to 90 pages of



Requests for Admissions containing 864 separate items one week after it is to answer "item by item" a 12-page statement of alleged deficiencies in its return to a massive documentary subpoena previously issued, and respond to a new subpoena duces tecum. Nor does the FTC explain how Amrep can be expected to prepare itself adequately for hearings when, despite numerous prior requests for discovery, the only discovery Amrep is accorded (a witness list containing 150 names and an exhibit list) will be forthcoming a scant 30 days prior to the hearings (see discussion in our main brief at pages 23-24). Thus, while the FTC required three years of investigation and post-complaint discovery -- including a nine month period required by complaint counsel for "diligently reviewing the fruits of its investigation" (FTC Brief at 28) -- Amrep is to receive only 30 days to attempt to interview or depose 150 witnesses, who are presumably scattered across the country, and to prepare for their cross-examination.

Although the FTC claims that Judge Metzner determined that the FTC schedule permitted Amrep sufficient time to prepare for the FTC case (FTC Brief at 17-18), the record plainly demonstrates that Judge Metzner's sole concern was in protecting the fairness and integrity of the criminal trial. Judge Metzner focused on the FTC schedule only insofar as it interfered with the criminal trial. He did not hold that the FTC schedule permitted Amrep sufficient time



to comply with the deadlines imposed in that proceeding.

Thus, in the following colloquy during oral argument, Judge Metzner made clear that he was concerned only with the effect of the FTC proceeding on his criminal trial and not with the validity of the FTC proceeding itself:

"MR. MANEKER: You cannot spend three months in this compressed discovery and six months in actual trial and thus occupy the entire period between now and the trial date you set and really prepare a case here.

What you do is either you default somewhere or you do it inadequately in both places and you don't get a fair trial, and the validity of this proceeding -- I think I say conservatively -- is in jeopardy. I would hazard a guess that if this sort of thing is permitted to go on it is clearly invalidated and that proceeding is invalidated as well.

THE COURT: I am not worried about that proceeding. I am only worried about this one." (emphasis added) (428a)

In fact, in his opinion Judge Metzner succinctly framed the issue before him as follows:

"Consequently, the issue to be decided here is whether Amrep has made sufficient showing that the schedule of the proceeding before the Commission will interfere with the trial of the indictment or the preparation of its defense." (485a)

Judge Metzner decided the limited issue before him by ruling that the FTC proceeding could continue through the presentation of the FTC's case-in-chief or through July 30,



1976 (whichever is earlier). However, the FTC would deny Amrep even the limited relief granted by Judge Metzner. It maintains that the FTC should be permitted to continue its proceedings beyond July 30, 1976, notwithstanding that such proceedings will interfere directly with the criminal trial. Characterizing the conflict that would result as a "hypothetical dilemma", the FTC suggests that actual conflicts between the FTC proceeding and the criminal trial should be resolved only as they occur (FTC brief at 32). These conflicts have already occurred, and the impairment of Amrep's right to an adequate opportunity to prepare and present its defenses in both proceedings would have occurred but for the stays of the FTC proceeding granted by the District Court and this Court.

If, as the FTC urges, the parties are required to delay the resolution of conflicts until the eve of the criminal trial, then the FTC proceeding would already have progressed to the point where its validity would be irreparably damaged by the lack of adequate time, counsel and the assistance of Amrep's principal officers in preparing and presenting its defense. The only means of preserving the integrity of the criminal trial at that point would be to adjourn it for a lengthy period for adequate preparation and to attempt to prevent use of the improper discovery already obtained. Clearly, this is a "solution" which would serve neither the



interests of the public, the FTC, the United States Attorney nor Amrep.

Amrep Will Be Unable to Secure the Assistance and Testimony of the Indicted Officers in the FTC Proceeding

The FTC does not dispute that the individual defendants in the criminal trial will be loathe to testify on Amrep's behalf or to provide assistance in responding to FTC discovery demands and preparing Amrep's defense in the FTC proceeding. Rather, the FTC suggests that Amrep should simply make do with other lower level employees (FTC Brief at 16, 24).

This ignores the obvious fact that the individual defendants are the top officers whose aid is essential if Amrep is to respond adequately to charges going to the heart of the way it has been doing business over a period of years. Indeed, these are the very men which the Government has indicted as being those most responsible in the formulation and implementation of the policies and practices being challenged. Their unavailability thus greatly prejudices Amrep's defense in a proceeding which threatens the very existence of this public company.

The Disclosure of the Criminal Defense

Nor is the FTC troubled by the impropriety of forcing Amrep to present a "dress rehearsal" of its defense



for the United States Attorney. The FTC does not deny that this would be the inevitable result of holding the FTC hearings in advance of the criminal trial. Rather, it asserts that the prejudice resulting therefrom may be ignored (FTC brief at 25). The courts have held otherwise.

Thus, in Silver v. McCamey, 221 F.2d 873 (D.C. Cir. 1955), trial of an administrative proceeding was held improper because it would have permitted discovery of respondent's defense to a criminal charge ("His necessary defense in the administrative hearing may disclose his evidence long in advance of his criminal trial and prejudice his defense in that trial." Id. at 875.) The proper remedy, the Court held, was temporary relief pending conclusion of the criminal proceedings, if that were necessary to protect the public. That could be accomplished without "disclosure of defenses to the criminal charge". Id. at 875. See also, Campbell v. Eastland, supra.

The cases cited by the FTC for the proposition that criminal defendants may not complain of disclosures resulting from civil discovery (FTC brief at 25) are clearly inapposite. In United States v. Simon, 373 F.2d 649 (2d Cir.), judgment vacated as moot, 389 U.S. 425 (1967) and United States v. American Radiator & Standard Sanitary Corporation, 388 F.2d 201 (3d Cir. 1967), the only claims dealt with on the merits were those raised by individual corporate officers.



Both decisions held that, under the circumstances presented there, the Fifth Amendment right against self-incrimination possessed by those defendants was sufficient to prevent improper discovery by the Government of their defenses. Thus, the individual defendants in those cases could continue to protect their criminal defense by invoking their right to silence. In the instant case, of course, Amrep has no right against self-incrimination, Curcio v. United States, 354 U.S. 118, 122 (1957) and Wilson v. United States, 221 U.S. 361 (1911). Therefore the unilateral discovery by the Government here, which will occur if the FTC proceeding is permitted to continue, will compel Amrep to present the United States Attorney with an extensive preview of Amrep's defense, and thereby impair the validity of the criminal trial.

The FTC speculates that the prejudice to Amrep resulting from such a "dress rehearsal" can be avoided, since the Administrative Law Judge may receive documents and testimony in camera in appropriate instances, pursuant to Section 3.45 of the Commission's Rules of Practice (FTC Brief at 25). However, there is no assurance that the Administrative Law Judge would be willing to invoke Section 3.45 at all, let alone hold all discovery and the entire three months of hearings in camera. Moreover even if the Administrative Law Judge agreed, in the first instance, to receive all documents and testimony in camera, there is no guarantee that Amrep would



continue to receive this protection, since Rule 3.45(c) of the Commission's Rules of Practice specifically authorizes the Commission, without notice to any affected party, to make "in camera documents and testimony available for inspection, copying or use by any other governmental agency."\* The Department of Justice is, of course, such an agency and thus the United States Attorney can gain access to all of the documents and testimony received in the FTC proceeding notwithstanding the fact that they were received in camera.

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\* Section 3.45(c) provides:

"Release of in camera information. -- In camera documents and testimony shall constitute a part of the confidential records of the Commission and shall be subject to the provisions of §4.11 of this chapter. However, the Commission, on its own motion without notice to any affected party, may make in camera documents and testimony available for inspection, copying or use by any other governmental agency."



### POINT III

#### A STAY OF THE FTC PROCEEDING WILL NOT JEOPARDIZE THE PUBLIC INTEREST

Although the FTC continues to claim that the public interest requires that the FTC proceeding go forward as scheduled, it has failed to explain why this professed concern for the public interest: (a) did not cause the FTC to act more expeditiously in an investigation that was commenced in early 1973; (b) did not move the FTC to seek a preliminary injunction; and (c) does not prevent the FTC from jeopardizing the validity of two massive proceedings, even though appropriate use of the criminal trial transcript in the FTC proceeding would result in little or no delay of the FTC hearings and would actually advance the determination of any subsequent restitution action.

Although the FTC claims that it has proceeded diligently in its investigation -- even during a period of nine months which it allegedly required for "reviewing the fruits of its investigation" (FTC Brief at 28) -- this diligence became evident only after the indictment was returned and the FTC commenced an unseemly race with the United States Attorney to try its case first. Thus, the FTC has failed to explain why the public interest requires a speedy determination in its case against Amrep, but not in its case against



Horizon Corporation (see discussion at pages 51-52 of our main brief). Indeed, in response to this obviously embarrassing question, the FTC lamely answers that "the Commission in its discretion proceeds against respondents in the fashion it deems best" (FTC Brief at 27), without even deigning to apprise this Court of the basis upon which it exercised such "discretion".

The FTC has similarly failed to explain satisfactorily why it has not sought an injunction against Amrep. Indeed, its only comment on the matter is that "[t]o the extent that Commission staff would have been occupied with injunction proceedings, it would have delayed their prosecution of the administrative hearing . . . ." (FTC Brief at 28). Thus, the FTC complains that it would be impossible for the Commission staff to conduct administrative hearings and seek a preliminary injunction at the same time. Yet the FTC insists that Amrep defend itself in two massive proceedings simultaneously.

The Commission itself has recognized the inherent weakness of FTC counsels' explanations for having failed to seek injunctive relief against Amrep. Thus, by order dated January 27, 1976 (a copy of which is annexed hereto as Exhibit A), the FTC directed complaint counsel "to consider whether a preliminary injunction should be sought" against



Amrep. Apparently, even the Commission believes that injunctive relief is a feasible means of protecting the public, if that were deemed necessary.

The FTC has also rejected out-of-hand Amrep's proposal to make appropriate use of the criminal trial transcript in the FTC proceeding, even though this would virtually eliminate any real delay in obtaining any cease and desist order to which the Commission may be entitled. Indeed, the criminal trial would encompass both the issues in the FTC administrative proceeding (i.e., whether Amrep's practices are "unfair" or "deceptive") and the issues in any judicial proceeding for consumer restitution (i.e., whether these practices were also "dishonest" or "fraudulent"). Since any restitution action could not even be instituted until the administrative proceeding had been finally concluded, use of the criminal transcript would greatly expedite the restitution action even if the FTC proceeding were not stayed.

The FTC, however, claims that the criminal trial transcript would merely "supplement" the FTC proceedings because the allegations in the FTC complaint differ from those in the indictment (FTC Brief at 30). Yet, the FTC fails to identify a single material difference between these allegations. While it is true that the criminal trial involves only Rio Rancho Estates and the FTC proceeding involves two



other Amrep developments as well, this does not result in a material difference between the two proceedings, since all the practices challenged by the FTC are applicable to the Rio Rancho development, which is by far Amrep's largest development (see discussion at pages 7-8 of our main brief). Indeed, some practices attacked by the FTC are alleged to occur only at Rio Rancho (FTC Complaint, 9a-11a).

Finally, even though different relief is being sought in the two proceedings, this is irrelevant to the proof required in each proceeding, which is the same as to the substantive allegations of wrongdoing. The only matters not dealt with in the criminal trial would be questions such as damage calculations or the proper scope of injunctive relief and these questions would be reached in the FTC proceeding (or subsequent restitution action) only if there were findings against Amrep on the merits.



CONCLUSION

For the foregoing reasons, Amrep respectfully requests that the proceeding before the FTC be stayed pending termination of the criminal action pending against it in the United States District Court for the Southern District of New York.

Dated: New York, New York  
February 20, 1976.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

76- 6008  
Index No. 76- 6013  
76- 1028

AMREP CORPORATION,  
-V- APPELLANT  
FEDERAL TRADE COMMISSION  
APPELLEE

~~Plaintiff~~

-----  
UNITED STATES OF AMERICA

-V-

AMREP CORPORATION, et al.,  
DEFENDANTS

~~Defendant~~

AFFIDAVIT OF SERVICE  
BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at  
11 WISTERIA COURT, ORANGEBURG, NEW YORK 10962

That on February 20,

19 76

deponent served the annexed

REPLY BRIEF OF APPELLANT

on BARRY MORRIS Esq.  
attorney(s) for OFFICE OF THE GENERAL COUNSEL  
FEDERAL TRADE COMMISSION

in this action at 6 St. Pennsylvania Ave. Washington, D.C. 20580  
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed  
in a postpaid properly addressed wrapper, in ~~a post office~~ official depository under the exclusive care  
and custody of the United States Postal Service within the State of New York.

Sworn to before me  
this 20th day  
of February 1976

Angelo M. Cupaiolo  
The name signed must be printed beneath  
ANGELO M. CUPAILO

Sandy Levitt  
SANDY LEVITT  
NOTARY PUBLIC, State of New York  
No. 60-4616562 Qual. in Westchester Co.  
Cert. filed in New York County  
Commission Expires March 30, 1977